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MARCO ANTONIO TOPETE

FILED
YOLO SUPERIOR COURT

APR 02 2010

By

Deputy

YOLO COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

Case no. CR08-3355

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff,

vs.

MARCO ANTONIO TOPETE,

Defendant(s).

**NOTICE OF MOTION AND MOTION
FOR CONTINUANCE OF TRIAL;
DECLARATION OF HAYES H.
GABLE, III; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: April 16, 2009
Time: 8:30 a.m.
Department: 6

TO: THE DISTRICT ATTORNEY OF YOLO COUNTY:


PLEASE TAKE NOTICE that the defendant, MARCO ANTONIO TOPETE, by and through his attorneys of record, will move the Court at the above time and place to continue the trial now set for May 17, 2010, to June 14, 2010.

This motion is made pursuant to the provisions of Penal Code section 1050 and is based upon the attached declaration of counsel, the memorandum of points and authorities submitted herewith, and on such other oral and/or documentary evidence that may be presented at the hearing.

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1 Dated: April 2, 2010

Respectfully submitted,

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4 HAYES H. GABLE, III
Attorney for Defendant
5 MARCO ANTONIO TOPETE

6 **DECLARATION OF HAYES H. GABLE, III**

7 I, HAYES H. GABLE, III, declare:

8 1. I am one of the attorney appointed to represent the defendant, MARCO ANTONIO
9 TOPETE, in the above-captioned action.

10 2. The defendant is charged by indictment with the capital murder of Yolo County Deputy
11 Sheriff Antonio Diaz on June 15, 2008.

12 3. On August 28, 2009, this court set a trial date of May 17, 2010.

13 4. Since that time, defense counsel has diligently prepared this case and continues to do so.
14 However, due to defense counsel's responsibilities in the matter of People v. Aaron Dunn,
15 Sacramento County Superior Court no. 06F02731, the defense will not be ready to proceed on May
16 17, 2010. In fact, counsel is currently in the guilt phase of that capital case. The trial is not expected
17 to conclude until the first or second week of May. Counsel then requires time to prepare motions
18 and complete investigation in the instant case.

19 5. As reflected in the authorities filed herewith, counsel for a defendant in a capital case have
20 a duty to their client to provide legal representation that is constitutionally adequate.
21 Constitutionally adequate representation requires counsel to make strategic and tactical decisions
22 based upon a thorough investigation of guilt phase issues and any mitigating factors which may be
23 relevant to a penalty phase of the trial. Failure to adequately investigate the case is not only shoddy
24 legal work, it risks reversal of any conviction and/or sentence imposed.

25 6. Counsel have identified the following areas that require additional investigation that must
26 be accomplished prior to trial:

27 (a) Discovery - To date we have received approximately 2693 pages of discovery. In
28 addition, approximately 65 CD's containing a variety of subject matter, including interviews of

1 witnesses, both audio and video, photographs, and crime scene video, have been provided through
2 informal discovery. Many of the recording will require transcription, in order to be reviewed by the
3 client and others consulting with counsel.

4 The prosecution, on or about May 7, 2009, served on the defense a list of factors in
5 aggravation, as required by Penal Code section 190.3. This statement include three felony
6 convictions and some 16 separate other crimes/conduct allegations, many of which involve multiple
7 alleged violations.

8 (b) Investigation - Investigation of guilt and penalty issues is continuing.

9 (c) Expert witness - The defense has, in addition to the investigators, retained expert
10 witnesses in a number of fields, including psychologists, a psychiatrist, a prison expert, a gang
11 expert, a social historian, a criminalist, a venue expert, and a jury consultant. These experts have
12 been appointed as the need becomes evident, based upon ongoing investigation. Some of them are
13 just starting their work. At present, it is anticipated they will have completed their work by the time
14 of trial.

15 7. Based upon the assumption that the defense will be ready to proceed on June 14, 2010, the
16 following schedule is proposed:

17 Venue Motion:

18 Defendant's Motion filed by April 9, 2010

19 People's Response filed by April 30, 2010

20 Defendant's Reply filed by May 7, 2010

21 Venue Hearing on May 21, 2010
22

23 In Limine Motions to be heard June 14 through June 18, 2010

24 Sequestered Jury Selection June 21, 2010 through July 2, 2010


25 Opening Statements July 6, 2010

26 8. It is the understanding of defense counsel that the District Attorney does not oppose this
27 proposed schedule.

28 Based upon the foregoing, it is my considered opinion, and that of co-counsel, Thomas A.

1 Purtell, that the earliest reasonable date for this case to proceed to trial would be June 14, 2010.

2 Executed at Sacramento, California, on April 2, 2010.

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5 HAYES H. GABLE, III

6 **MEMORANDUM OF POINTS AND AUTHORITIES**


7 California Penal Code section 1050 sets forth procedures for continuances of trial in criminal
8 cases. Subdivision (a) establishes the People's right to a speedy trial; the defendant has a
9 constitutional right to speedy trial under both the state and federal constitutions. However,
10 subdivision (a) of section 1050 continues to recognize that death penalty prosecutions are different,
11 and they are to be tried only when "both the prosecution and the defense have informed the court that
12 they are prepared to proceed to trial . . . " Penal Code 11050(a).

13 The prosecution may be ready for trial as presently scheduled, but the defense is not. Until
14 both the prosecution and the defense announce ready for trial, the statutory right of the people must
15 give way. As demonstrated in the present motion to continue the trial date, good cause exists to
16 continue the trial in this case. If further good cause must be determined by the court, an *ex parte*, *in*
17 *camera* hearing is requested in order to allow counsel to divulge more details without prejudice to
18 Mr. Topete's defense.

19 Dated: April 2, 2010

Respectfully submitted,

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21 HAYES H. GABLE, III

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23 THOMAS A. PURTELL
24 Attorneys for Defendant
25 MARCO ANTONIO TOPETE
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1 CERTIFICATE OF SERVICE

2 I am a citizen of the United States and a resident of the County of Yolo. I am over the age
3 of eighteen years and not a party to the above-entitled action; my business address is 430 Third
Street, Woodland, CA 95695

4 On the date below, I served the following document(s):

5 **NOTICE OF MOTION AND MOTION FOR CONTINUANCE**
6 **OF TRIAL; DECLARATION OF HAYES H. GABLE, III;**
MEMORANDUM OF POINTS AND AUTHORITIES

7 ☐ BY MAIL. I caused such envelope, with postage thereon fully prepaid, to be placed in the
8 United States Mail at Sacramento, California addressed as follows:

9 ☒ BY PERSONAL SERVICE. I caused such document(s) to be delivered by hand to the
offices of the person(s) listed below:

10 JEFF REISIG
11 GARRET HAMILTON
12 Yolo County District Attorney
301 Second Street
Woodland, CA 95695

13
14 ☐ BY FACSIMILE SERVICE. I caused the document(s) to be served via facsimile to the
15 person(s) listed below:

16 ☐ BY EMAIL ATTACHMENT. I caused the document(s) to be served via email as an
17 attachment to the person(s) listed below:

18
19 I declare under penalty of perjury that the foregoing is true and correct.

20 Executed on April ²/₃, 2010, at Woodland, California.

21 
22 THOMAS A. PURTELL